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10/725,051

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Clarence Thibeau

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NIXON & VANDERHYE, PC  
901 NORTH GLEBE ROAD, 11TH FLOOR  
ARLINGTON, VA 22203

EXAMINER

LAUX, JESSICA L

ART UNIT

PAPER NUMBER

3635

MAIL DATE

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

10/725,051

Applicant(s)

THIBEAU, CLARENCE

Examiner

Jessica Laux

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 08 March 2007.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) 5,6,12-14,16 and 19-22 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 7-11, 15, 17-18, 23-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                 | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date: _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date: _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Response to Arguments***

Applicant's arguments with respect to claims 1-4, 7-11, 15, 17-18, 23-24 have been considered but are moot in view of the new ground(s) of rejection.

### ***Claim Objections***

Claims 1 and 24 are objected to because of the following informalities: the claims recite the limitation "potion" which should correctly read "portion". Appropriate correction is required.

Claims 1, 23 and 24 are objected to because of the following informalities: the limitation "portions of the matter surface areas corresponding to the protrusions' bases bien un-apertured on another side of the matter surface areas opposite the protrusions" is worded in such a way as to cause confusion regarding the relationship between the protrusions bases and the another side of the matter surface areas (both of which lack antecedent basis) and the matter surface areas. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 23 and 24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

***Claim Rejections - 35 USC § 102***

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4, 7-10, 15, 17, 23-24 are rejected under 35 U.S.C. 102(b) as being anticipated by <http://web.archive.org/web/20010202015800/http://duragrid.com/>.

Regarding claims 1-4, 7-10, 17: Duragrid discloses a spacer capable of providing spacing between an outer wall surface of a building under construction and an exterior cladding material, wherein the exterior cladding material is one of: siding, shingles, brick and clapboard, the spacer comprising:

a planar surface comprising a plurality of interconnected matter surface areas and a plurality of diamond, square, rectangular or quadrilateral apertures, in a repeating pattern, between the matter surface areas, the apertures aggregately comprising a greater portion of the planar surface's total area than the matter surface areas aggregately comprise (page 5, figures 1-4c); and

a plurality of mutually spaced conical protrusions of substantially uniform height protruding perpendicularly, in a repeating pattern, to form a protrusion plane parallel to the planar surface, from only one side of said matter surface areas, the apexes of at least some of said protrusions forming a protrusion plane, portions of the matter surface areas corresponding to the protrusions' bases being un-apertured on another side of the matter surface areas opposite the protrusions (page 3, figure 1);

whereby, when the spacer is in place between the outer wall surface of the building and the exterior cladding material, liquid and air may pass through channels formed between the protrusions, and not through the protrusions, to facilitate air

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circulation in, and liquid drainage from, the spacing between the outer wall surface and the exterior cladding material.

Regarding claim 15: The air gap spacer according to claim 1 above, wherein the air gap spacer is adapted to be secured to the surface of the building being constructed by way of securing means selected from the group consisting of tacks, nails and screws (where the spacer has apertures (page 3, element A) that are adapted to be secured to a building with tacks, nails, or screws).

Regarding claim 23: Duragrid discloses an air gap spacer, capable of providing spacing between an outer wall surface of a building under construction and an exterior cladding material, the air gap spacer comprising:

a planar surface (capable of attachment to an exterior sheathing or wrap over the outer wall surface prior to the exterior cladding material being attached), the planar surface being comprised of a plurality of matter surface areas interconnected in a lattice-like pattern and a plurality of apertures between the matter surface areas, the apertures aggregately comprising a greater portion of the surface's total area than the matter surface areas (page 5, figures 1-4c); and

a plurality of mutually spaced protrusions of substantially uniform height protruding from only one side of said matter surface areas, the apices of at least some of said protrusions forming a protrusion plane (where the apices are all of the same height and therefore end in the same plane) for abutment to the outer wall surface of the building, where portions of the matter surface areas corresponding to the protrusions'

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bases being un-apertured on another side of the matter surface areas opposite the protrusions (page 3, figure 1);

whereby, when the spacer is in place, liquid and air may pass through channels formed between the protrusions, and not through the protrusions, to facilitate air circulation in, and liquid drainage from, the spacing between the outer wall surface and the exterior cladding material; and

wherein the protrusions have a conical shape (page 3, element A).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 11 and 18 rejected under 35 U.S.C. 103(a) as being unpatentable over <http://web.archive.org/web/2001020201580/http://duragrid.com/>.

Regarding claims 11 and 18: Duragrid discloses the spacer as in the above claims, but does not expressly disclose the material the spacer is made of. However it appears from the disclosure of Duragrid that the spacer is made of a plastic material. Further applicant has disclosed various types of materials suitable for the spacer and has not disclosed that the claimed materials provide and advantage, solve a problem or are for a particular purpose. Therefore it would have been obvious to one of ordinary skill in the art at the time the invention was made in view of the disclose of Duragrid to

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make the spacer of plastic for its ease in manufacture and water resistance characteristics.

Additionally it should be noted that claim 11 is considered a product-by-process claim. The patentability of the product does not depend on its method of production. Determination of patentability is based on the product itself. See MPEP 2113. If the product-by-process claim is the same as or obvious from a product of the same prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed.Cir.1985). In this case the spacer of Duragrid appears to be made of plastic and injection moulding, and pouring moulding are obvious methods of producing a plastic product.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jessica Laux whose telephone number is 571-272-8228. The examiner can normally be reached on Monday thru Friday, 6:30am to 2:30pm (est).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard Chilcot can be reached on 571-272-6777. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



JL  
05/21/2007



Jeanette Chapman  
Primary Examiner